



**OPASTCO**

February 1, 2005

***Ex Parte Presentation***

Chairman Michael K. Powell  
Commissioner Kathleen Q. Abernathy  
Commissioner Jonathan S. Adelstein  
Commissioner Michael J. Copps  
Commissioner Kevin J. Martin

**Re: Federal-State Joint Board on Universal Service  
CC Docket No. 96-45**

Dear Commissioners,

As the statutory deadline approaches for the FCC to adopt an Order on the Universal Service Joint Board's February 27, 2004 Recommended Decision,<sup>1</sup> the Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO) urges you to adopt a strong set of standardized minimum criteria for use by state commissions and the FCC when evaluating whether applicants are qualified to be designated as eligible telecommunications carriers (ETC) in rural service areas. Just as important, it is critical that the FCC ensure that its bureaus consistently and rigorously apply whatever guidelines are adopted.

In the Order designating Virginia Cellular, LLC as an ETC, the FCC correctly recognized the need for a more stringent public interest analysis for ETC designations in rural service areas and that the value of increased competition, in and of itself, is not sufficient to satisfy the public interest test.<sup>2</sup> The Order adopted a framework for public interest analyses that was to be applied in rural service areas pending further action by the Commission. Yet, it appears that the Wireline Competition Bureau failed to carefully

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<sup>1</sup> *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Recommended Decision, 19 FCC Rcd 4257 (2004) (Recommended Decision).

<sup>2</sup> *Federal-State Joint Board on Universal Service, Virginia Cellular, LLC Petition for Designation as an Eligible Telecommunications Carrier Throughout its Licensed Service Area in the Commonwealth of Virginia*, CC Docket No. 96-45, Memorandum Opinion and Order, 19 FCC Rcd 1563, 1565, ¶4 (2004) (Virginia Cellular).

apply the interim public interest framework when it designated Nextel Partners as an ETC in seven states in August 2004.<sup>3</sup>

Specifically, a series of ex parte communications from TDS Telecom<sup>4</sup> indicate that Nextel Partners' own coverage maps do not demonstrate any significant level of service in most of the TDS Telecom service areas in which Nextel Partners was designated as an ETC. Moreover, the buildout plans Nextel Partners submitted to the Commission do not show any intention to build facilities to expand service into TDS Telecom service areas. Thus, the designation of Nextel Partners as an ETC in TDS Telecom's service areas, despite these facts, demonstrates a lack of commitment by the Wireline Competition Bureau to the more stringent public interest test that the Commission articulated in the Virginia Cellular Order. Clearly, there was no meaningful evaluation of "the competitive ETC's ability to provide the supported services throughout the designated area within a reasonable time frame."<sup>5</sup>

If the FCC's own bureaus cannot adhere to an adopted framework for conducting public interest analyses, how can it reasonably expect state commissions to follow any federal guidelines on minimum ETC eligibility criteria that are adopted? It is essential that the Commission lead by example and conduct a rigorous public interest analysis each and every time it considers an ETC application for a rural service area. OPASTCO recommends that the Commission adopt the following standardized minimum criteria for both state and federal regulators to use when evaluating ETC applications for areas served by rural telephone companies:<sup>6</sup>

- 1. The applicant must demonstrate that it has adequate financial resources in order to provide quality services throughout the competitive ETC designated service area.** The business plans of an ETC applicant should be carefully reviewed by regulators to ensure that they are capable of sustaining their operations for the long term. Regulators should consider whether applicants are using the universal service rules for regulatory arbitrage or as a means to "prop-up" communications businesses that rely, in large part, on the use of universal service support. It makes no sense to disrupt a rural service area by designating a carrier that does not have the financial strength to make a long-term commitment.

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<sup>3</sup> *Federal-State Joint Board on Universal Service, NPCR, Inc. d/b/a/ Nextel Partners Petitions for Designation as an Eligible Telecommunications Carrier in the states of Alabama, Florida, Georgia, Pennsylvania, and Virginia, Nextel Partners of Upstate New York, Inc. d/b/a Nextel Partners Petition for Designation as an Eligible Telecommunications Carrier in the state of New York*, CC Docket No. 96-45, Order, 19 FCC Rcd 16530 (2004).

<sup>4</sup> See, Notices of Ex Parte Communication from TDS Telecom in CC Docket No. 96-45 (Dec. 20, 2004, Nov. 10, 2004, Nov. 5, 2004, Oct. 28, 2004, Oct. 27, 2004). See also, Ex Parte Letters from TDS Telecom to Christopher Libertelli, Senior Legal Advisor to Chairman Michael Powell, and Jessica Rosenworcel, Legal Advisor to Commissioner Michael Copps (Nov. 5, 2004).

<sup>5</sup> Virginia Cellular, 19 FCC Rcd 1565, ¶4.

<sup>6</sup> These criteria are also endorsed by the Rural Independent Competitive Alliance (RICA) and the Rural Telecommunications Group (RTG). See, Comments of the Rural Telecommunications Associations in CC Docket No. 96-45 (fil. Aug. 6, 2004).

2. **The applicant must demonstrate its commitment and ability to provide the supported services throughout the ETC designated service area to all customers who make a reasonable request for service.** ETC applicants should be required to file a formal build-out plan for areas where facilities have not yet been built out. A build-out plan should include a reasonable schedule, with target completion dates, for each specific build-out project that will lead to a network that provides 100 percent coverage of the ETC applicant's designated area. Regulators should monitor the progress of the carrier's network construction and determine whether or not the ETC is meeting the goals that it has agreed to. Regulators should also be allowed to require ETC applicants to explore the possibility of serving requesting customers for which the carrier has not yet extended its own network through resale of another carrier's service. Resale will allow market forces to determine when and where a competitive ETC builds out its network within the designated service area without putting undue pressure on the Universal Service Fund.
3. **The applicant must demonstrate its ability to remain functional in emergency situations.** Regulators should evaluate an ETC applicant's ability to function without an external power source, reroute traffic around damaged facilities, handle traffic spikes, etc.
4. **The applicant must demonstrate its commitment to utilize the funding it receives only to support infrastructure within the ETC designated service area.** A competitive ETC's certification letter does not provide the essential information necessary to determine if support is used to provide the supported services in the designated service area. This is because competitive ETCs in rural service areas currently receive support based on the unrelated investment record of the incumbent and not their own. The public interest requires more than an assumption that competitive ETCs will use the support they receive on infrastructure and supported services within their designated service area. In the Virginia Cellular Order, the FCC took a step in the right direction by stating that it may institute an inquiry on its own motion to examine any ETC's records and documentation to ensure that the high-cost support the ETC receives is being used for its intended purposes and in the areas where it is designated.<sup>7</sup>
5. **Regulators must consider the impact of the designation on the USF.** Regulators should consider the level of per-line support to be received by a competitive ETC. It is critical that the USF be treated by state commissions and the FCC as a scarce national resource and be carefully managed to serve the public interest.

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<sup>7</sup> Virginia Cellular, 19 FCC Rcd 1584-1585, ¶43.

6. **Regulators must continue to analyze whether or not an ETC designation for a service area less than the study area of a rural telephone company would lead to creamskimming by allowing the applicant to serve only the low-cost, high revenue customers in a rural telephone company's service area.** The Commission should reaffirm its support for the Joint Board's position that study area-wide service should be the norm in the areas served by rural telephone companies. Maintaining the requirement for a creamskimming analysis is consistent with the Virginia Cellular Order in which Virginia Cellular was denied ETC designation in the NTELOS study area because their license area covered only the low-cost portion of the study area.<sup>8</sup>
7. **Regulators may choose to impose consumer protection requirements as a precondition for designation as a competitive ETC.** Imposing consumer protection requirements as part of the ETC designation process is consistent with the "public interest, convenience and necessity" to ensure that consumers are able to receive high quality, affordable, and reasonably comparable service and rates.

OPASTCO agrees with the Joint Board that federal guidelines on minimum ETC eligibility criteria for rural service areas should assist regulators in determining whether or not the public interest would be served by a carrier's designation as an ETC. Minimum eligibility criteria should also improve the long-term sustainability of the Universal Service Fund by only allowing fully qualified carriers that are capable of, and committed to, providing universal service to receive high-cost support.<sup>9</sup> However, in order for this to occur, state and federal regulators must be committed to using the adopted guidelines and conducting a thorough and rigorous public interest analysis on every competitive ETC application for a rural service area. There must be a high degree of confidence by regulators that the minimum expectations that are adopted can and will be met prior to the granting of ETC status.

Sincerely,

/s/ Stuart Polikoff  
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of Small Telecommunications Companies

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cc: Federal-State Joint Board on Universal Service

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<sup>8</sup> *Id.*, 19 FCC Rcd 1578-1579, ¶¶32-35.

<sup>9</sup> Recommended Decision, 19 FCC Rcd 4258, ¶2.